

REMARKS

Claims 44-60 and 100-117 are pending in the application. This application was previously subjected to an election of species in the previous Office Action. In response to that Office Action, Applicant elected the presently pending claims and canceled claims directed to a non-elected species. The June 11, 2008 Office Action now contends that an additional election of species is necessary. Specifically, the Office Action contends that the following embodiments are directed to patentably distinct species:

Species I directed to a process of acquiring tissue without a septum; and

Species II directed to a process of acquiring tissue with a septum. [O.A., p. 2]

Applicant acknowledges that the Office Action contends the two species are patentably distinct and that the species "are not obvious variants of each other," and Applicant does not dispute these contentions. However, when a claim on a common generic invention is allowable, and the species are related, a reasonable number of species may be claimed as well. Moreover, Manual of Patent Examining Procedure §802.01 points out that a restriction requirement is proper only if the different inventions are truly independent, which means that there is no disclosed relationship between the three species; that is, that they are unconnected in design, operation or effect. Manual of Patent Examining Procedure §803 requires that it must be demonstrated that the three species have no disclosed relationship. Only then is restriction required. Here, the Office Action merely states that "claims to the different species recite the mutually exclusive characteristics of such species." This statement alone is insufficient for establishing the necessity of an election of species. Accordingly, Applicant respectfully submits that the Office Action has failed to show that no relationship between the species set forth above exists, and it is the burden of the Office Action to establish with evidence of record to demonstrate that the species have no relationship.

It is further submitted that in view of the fees charged for filing of divisional patent applications and prosecution and maintaining the resulting patents, an undue burden is placed on the Applicant in light of the previous restriction requirement in this case. Thus, any restriction requirement must be clearly supported in the record.

The Office Action states that "there is an examination and search burden for these patentably distinct species due to their mutually exclusive characteristics." [Office Action, p. 2] However, the mere fact that a burden exists is not justification for restricting the present invention, particularly where an election of species has already been made in this case.

Applicant further traverses the contention that Species I is mutually exclusive with Species II. Claim 44, which is silent as to the use of a septum, uses the transitional word "comprising." The steps of Claim 44 do not require nor exclude the use of a septum in the process. Claim 100 merely adds the step of removing a septum from between the acquisition members. The Office Action fails to explain how this addition makes the two claims "mutually exclusive." Accordingly, Applicant respectfully traverses the requirement for restriction or election of species and requests that the Examiner withdraw the request and conduct an examination of the claims presently pending.

Pursuant to 37 C.F.R. §1.143, Applicant provisionally elects Species I (Claims 44 - 52) and will cancel the non-elected claims in the next amendment if the restriction requirement is maintained. Reconsideration of the Claims are respectfully requested.

The Commissioner is authorized to charge any deficiencies or fees in connection with this amendment to Deposit Account No. 06-2425

Respectfully submitted,
FULWIDER PATTON LLP

By: /Michael J. Moffatt/
Michael J. Moffatt
Registration No. 39,304

MJM:eab

Howard Hughes Center
6060 Center Drive, Tenth Floor
Los Angeles, CA 90045
Telephone: (310) 824-5555
Facsimile: (310) 824-9696
Customer No. 24201
293804.1